Supreme Court, U.S.
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Docket No. _____

In the Supreme Court of the United States

JOSE ZOLLINO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for Writ of Certiorari to
the United States Court of Appeals for
the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether Petitioner is entitled to relief based on his complaint that his sentence violated his rights under the Sixth Amendment as stated by this Court in Blakely v. Washington, (and later in United States v. Booker) which was raised for the first time on appeal in a Motion for An Issuance of a Certificate Appealability from an order denying his petition filed in the District Court under 28 U.S.C§2255.

LIST OF ALL PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Appellant: Jose Zollino

Appellee: United States of America

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CITATION OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS OR ADMINISTRATIVE AGENCIES

The February 14, 2005, Order of the United States Court of Appeals for the Fifth Circuit Denying Motion for Rehearing, which is set out at p.1a of the Appendix to this petition. The January 11, 2005, Order of the United States Court of Appeals for the Fifth Circuit Denying Certificate of Appealability, which is set out at pp.2a-3a of the Appendix to this petition. The August 10, 2004, Order of the United States District Court Denying Request for Certificate of Appealability, which is set out on p.4a of the Appendix to this petition. The March 29, 2004, Order of the United States District Court on Magistrate's Memorandum and Recommendation, which is set out on pp.6a-15a of the Appendix to this petition. The January 22, 2004, United States Magistrate's Memorandum and Recommendation, which is set out on pp.16a-43a of the Appendix to this petition. The Judgment of the United States District Court in a Criminal Case set out on pp.44a of the Appendix to this petition.

STATEMENT OF THE BASIS FOR JURISDICTION

1. The judgment of the United States Court of Appeals for the Fifth Circuit which is sought to be reviewed was entered on January 11, 2005;

2. A Motion for Rehearing was filed and an Order Denying the Motion for Rehearing was entered by the United States Court of Appeals for the Fifth Circuit on February 14, 2005.

3. The statutory provision which confers on this court jurisdiction to review on Writ of Certiorari the Judgment or Order in question is 28 U.S.C. §1254.

4. The notification required by Rule 29.4(a) requiring service on the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W. Washington, D.C. 20530-0001 has been made.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitutional Provision involved in this case is the Sixth Amendment to the United States Constitution which provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The statutory provision involved is 28 U.S.C§2253. It is set forth in the appendix.

STATEMENT OF THE CASE

Proceedings in the Courts Below

Petitioner, Jose Zollino, was charged by indictment with criminal offenses arising out of his participation in the

operations of an investment firm in San Antonio, Texas. (Rec. Vol. 2, p.334). He entered a plea of guilty to two counts of the indictment as part of a plea agreement. (Rec. Vol. 2, p.469). Pursuant to the plea agreement, Petitioner was sentenced to a prison term of one hundred forty-four (144) months (Rec. Vol. 2, p.495). The plea agreement included provisions for waiver of appeal (Rec. Vol. 2, p.469). Post-judgment, Petitioner filed a Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. §2255 (Rec. Vol. 3, p. 657).

The Motion was referred to the Magistrate who issued a Memorandum and Recommendations on January 22, 2004 (Rec. Vol. 4, p. 27). Mr. Zollino filed Objections to the Magistrate's Memorandum and Recommendations (Rec. Vol. 4, p. 52). The District Court entered its Order Adopting the Magistrate's Memorandum and Recommendations and Denying Motion to Vacate Sentence was signed on March 29, 2004 (Supp. Rec., p. 1). Petitioner gave notice of appeal to this court (Supp. Rec., p. 11). The District Court denied issuance of a certificate of appealability(Supp. Rec., p. 1).

The District Court had jurisdiction of this case pursuant to 28 U.S.C.§§ 2241 and 2255. This case was filed by Petitioner Jose Zollino as a Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. §2255 (Rec. Vol. 3, p. 657). Petitioner sought habeas corpus relief from his judgment of conviction and sentence of confinement in Cause No. SA-01-CR-180(1)EP, United States of America v. Jose Zollino, United States District Court for the Western District of Texas. The date judgment was announced in open court was October 9, 2002(Rec. Vol. 10, p. 41). A written judgment was subsequently issued on October 28, 2002(Rec. Vol. 3, p. 495). The Motion for Relief under 28 U.S.C. §2255 was filed on October 8, 2003(Rec. Vol. 3, p. 657). The Motion for Relief was denied by the District Court(Supp. Rec., p.1) and the District Court has refused to issue a Certificate of Appealability(2nd Supp. Rec., p 1).

The United States Court of Appeals for the Fifth Circuit has jurisdiction of this cause pursuant to 28 U.S.C.§2253 entitled "Appeal".

The District Court's Order Adopting the Magistrate's Memorandum and Recommendations and Denying Motion to Vacate Sentence was signed on March 29, 2004 (Supp. Rec., p. 1). Thereafter, Petitioner, Jose Zollino timely gave notice of appeal by mailing the Notice of Appeal by regular, first class mail through legal mail at FCI Forrest City on April 9, 2004. (Supp. Rec., p. 11). On August 16, 2004, the District Court entered its Order Denying Certificate of Appealability in this cause. (2nd Supp. Rec., p. 1).

This appeal is from the final order of the District Court Adopting the Magistrate's Memorandum and Recommendations and Denying Motion to Vacate Sentence and from the final order of the District Court Denying Certificate of Appealability which dispose of all parties and claims.

Entry of Plea

Mr. Zollino entered into a plea agreement with the Government (Rec. Vol 2, p. 469). As part of his agreement, Mr. Zollino agreed to plead guilty to Count I, charging Conspiracy to Commit Fraud, and Count XII, charging Conspiracy to Launder Monetary Instruments, of the superceding indictment (Rec. Vol. 2, p. 469). The remaining counts of the superceding indictment were dismissed pursuant to the agreement (Rec. Vol. 2, p. 334). The plea agreement included a stipulation as to punishment pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure. That agreement was that the punishment would be a term of imprisonment of 144 months. That was the only agreement regarding punishment set forth in the plea agreement which was in writing and filed with the Court. The parties did not

submit a written factual basis but the factual basis was recited into the record by the Assistant United States Attorney with certain objections and exceptions made by counsel for the Petitioner (Rec. Vol.9, pp.16-19). Petitioner, through counsel, specifically objected to and did not accept the allegations as to the amount of the loss (Rec. Vol.9, p. 19).

Pre-Sentence Report

Following the entry and acceptance of the plea by the district court a pre-sentence investigation report(PSR) was prepared. The PSR, in discussing the offense conduct, included information that was not a part of the factual basis for the plea, had not been proven beyond a reasonable doubt or stipulated or agreed to by Mr. Zollino. Such unproven information included a statement entitled "Victim Impact" in paragraph 13 which provided as follows:

> This offense involves at least 1,600 investor accounts. The total loss to investors was Four hundred twenty million, four hundred eighty-seven thousand, four hundred ninety-six dollars($420,487,496.00). Mr. Len B. Blackwell, with Price Waterhouse Coopers, is the trustee for IG and
>
> IWG Services, Ltd. and co-receiver for InverWorld, Inc. and InverWorld Securities, Inc. According to Mr. Blackwell, $78.7 million dollars have been recovered and disbursed to the victims.

(PSR paragraph 13).

The sentencing guideline calculation of offense level is set forth in paragraphs 16 through 28 of the PSR. According to the calculation, the total offense level was determined to be 36. That offense level was reached as follows:

Base offense level. The offense guideline producing the highest offense level, that for 18 U.S.C. §1956, Money Laundering, was used. That guideline, found in USSG §2S 1.1(a)(2), calls for a base offense level of 20. (PSR paragraph 18). Adjustments. An increase in offense level by 13 was applied based on the amount of total loss of $420,487,496.00 dollars. This was based on USSG §2S1.1(b)(2)(n). (PSR paragraph 19).

A four level increase was applied for role in the offense because Mr. Zollino was determined by the PSR to be an organizer or leader of a criminal activity that involved five or more participants. This adjustment was based on USSG §3B1.1(a). (PSR paragraph 21).

A two level increase was also recommended pursuant to USSG §3B1.3 because "the Defendant abused his position of power and trust as the chairman of the board for InverWorld, Inc., during the commission of the offenses." (PSR paragraph 22).

Total Offense Level: This resulted in a total adjusted offense level of 39. The pre-sentence report recommended a three level reduction in offense level for acceptance of responsibility under USSG §3E1.1(a) and (b)(2). (PSR paragraph 25). The resulting offense level was 36. (PSR paragraph 26). The pre-sentence report determined that Mr. Zollino had no criminal history and therefore his criminal history category was applied at I. (PSR paragraph 31). The sentencing guideline range of punishment set forth in the PSR, paragraph 50, provided that, based on the combined offense level of 36 and the criminal history category of I, the guideline range of imprisonment was 188 to 235 months. (PSR paragraph 50). The PSR provided for restitution in the amount of $ 341,787,496.00 dollars. (PSR paragraph 63).

Objections to Pre-Sentence Report

Prior to sentencing Mr. Zollino filed objections to the PSR. Many of the objections were to the determination of the amount of restitution which is a matter not supported in the record, not stipulated or agreed to upon entry of the plea and not otherwise proven to the Court. Mr. Zollino objected to paragraph 13 in which the PSR stated the total amount of the loss was $420,487,496.00 dollars(Objections to PSR pp.7-8). The objections included a complaint that the amount of the loss had not been established. (Objections to PSR p. 8). Mr. Zollino also objected to the increase in offense levels in the pre-sentence report pursuant to USSG §3B1.1. (Objections to PSR).

The adjustment for role in the offense increasing the offense by four levels as a result of being a leader or organizer of criminal activity involving five or more participants was objected to on the basis that there was no showing in the record that there were five or more participants in the criminal activity. Mr. Zollino also objected to the two level adjustment for role in the offense because of his position as Chairman of InverWorld, Inc. (Objections to PSR p.9). It was pointed out that others had decision making powers regarding InverWorld and the two level increase should not have been assessed. Mr. Zollino made additional objections to the recommended restitution figure, paragraph 63 of the pre-sentence report.(Objections to PSR, pp.11-12).

Sentencing Hearing

At the sentencing hearing on October 9, 2001, counsel for Mr. Zollino presented objections to the pre-sentence report and specifically to the amount of the loss calculation and restitution figure. (Rec. Vol. 10, pp.3-4).

In spite of Mr. Zollino's objections, and in spite of the lack of any evidence supporting the allegation as to the number of investors as well as the claim of the total amount of the loss,

the Court accepted those figures from the pre-sentence report:

> The Court is going to accept the number of investors and the total amount of loss for purposes of computing the guidelines, and I think that amount comes to $420,487,496.00 dollars and the Court finds that the Defendant made all of the significant decisions relating to the fraudulent behavior and abuse of position of power and trust as the head of the corporation, so the Court is going to overrule the objections.

(Rec. Vol. 10, p. 8).

There was never any evidence introduced to support the district court's findings. There was no explanation as to why a figure representing total assets under management at the time InverWorld entities were put under receivership related to the alleged total amount of the loss. Although it was "accepted" by the court for purposes of "computing the guidelines" (Rec. Vol 10, p.8), the court did not specify a restitution figure and left that issue open. (Rec. Vol. 10, pp.8-9).

Thereafter, on October 29, 2002, the court entered its written Judgment which ordered restitution in the amount of $341,787,496.00 dollars (Rec. Vol. 3, p. 495).

Utilizing the term "amount of the loss" was an erroneous conclusion by the Court and is a misnomer as Section 2S1.1 of the Sentencing Guidelines and specifically sub-section (a)(2), utilized by the Pre-sentence Report and the court to determine a guideline figure calls for a determination of the value of the laundered funds. There is nothing in the record to suggest that $420,487,496.00 dollars in funds were "laundered". In the commentary to the current sentencing guideline section 2S1.1, laundered funds is defined as "the property, funds or monetary instrument involved in the transaction, financial transaction, monetary transaction, transportation, transfer, or transmission in violation of 18 U.S.C.§1956 or §1957." There is no evidence in the record to

support a finding that more than 420 million dollars was "laundered". The procedure utilized by the district court undermined all the sentencing decisions. In the first instance, there was no factual support for the 420 million dollar figure. Second, there was no link shown between that number and the definition of laundered funds.

As a result, there was an insufficient basis for the determination of the amount of the loss. While the district court may adopt the pre-sentence report in making findings in response to a Defendant's challenges, the pre-sentence report must supply facts supporting its conclusion and the District Court must specifically adopt those findings. United States v. Tam, 240 F.3d 797 (9th Cir. 2001).

However, in the instant case there are no specific facts supplied in the pre-sentence report, only the hearsay conclusion from the receiver Mr. Blackwell. In United States v. Mahler, 984 F. 2d 899 (8th Cir. 1993), the sentence was reversed because the District Court failed to resolve an objection by the defendant that hearsay lacked sufficient indicia of reliability to be relied upon. In this case the Petitioner consistently challenged the $420 million dollar figure and complained that it was not reliable and not complete as to the actual facts of the case and any true losses to investors.

ARGUMENT

Petitioner's complaint is that the Court of Appeals committed error in refusing to issue a certificate of appealability based on his complaints raised under Blakely v. Washington. This Court's decision in Booker v. Washington was issued the day after the Court of Appeals denied the certificate of appealability and was raised in Petitioner's Motion for Rehearing.

A certificate of appealability (COA) may issue "only if the applicant has made a substantial showing of the denial of

a constitutional right." 28 U.S.C. §2253(c)(2). The COA determination under §2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. Miller-El v. Cockrell, 537 U.S. 322, 336(2003). The certificate should issue if reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. Slack. v. McDaniel, 529 U.S. 473, 484 (2000). This inquiry does not require a showing that the appeal will succeed. Miller-El v. Cockrell, 537 U.S. at 337. A claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. Miller-el v. Cockrell, at 339. Any doubt regarding whether to grant a COA is resolved in favor of the petitioner and the severity of the penalty may be considered in making this determination. Fuller v. Johnson, 114 F. 3d 491, 495(5th Cir. 1997).

Whether Mr. Zollino's sentence was determined in violation of the Sixth Amendment

In his §2255 Motion, Mr. Zollino objected to the calculation of his sentence under the United States Sentencing Guidelines. Specifically, he objected that the District Court committed error in:

a. Imposing a five point enhancement for being a leader or organizer of criminal activity involving five or more participants under USSG §3B1.1(a).

b. Imposing a thirteen point enhancement for amount of the loss under USSG §2S1.1(b)(2)(n).

There was another adjustment to the total offense level to which no specific objection was raised but which was objectionable under the Sixth Amendment as follows:

> A two level increase pursuant to USSG §3B1.3 because the Defendant abused his position of power and trust as the chairman of the board for InverWorld, Inc., during the commission of the offenses.

(PSR paragraph 22).

After giving Mr. Zollino credit for acceptance of responsibility, the PSR total offense level was computed at 36 with a sentencing range under criminal history category I of 188-235 months. Under the circumstances, it is no wonder Mr. Zollino agreed to a 144 month sentence. However, had Mr. Zollino's Sixth Amendment rights been given consideration under this Court's decision in United States v. Booker, the total offense level would have been 20 levels lower. There was no evidence introduced at the plea or sentencing hearing to support the guideline adjustments referenced above.

As a result, the total offense level as actually established at the sentencing hearing was 16 and the sentencing range should have been 21-27 months. Mr. Zollino was unfairly pressed into accepting the onerous plea agreement offered by the government based on the belief that his guideline sentence could be even greater based on fact findings not required to be made by a jury at a contested due process trial and based on a standard of a preponderance of the evidence with the findings based primarily on a report of a United States Probation Officer.

Waiver Issues

Plea Agreement to Specific Sentence

The District Court concluded, in part, that Mr. Zollino had waived complaints regarding guideline sentencing because of his plea agreement regarding a specific sentence of 144 months pursuant to Fed. R. Crim. P. 11(c)(1)(C). However, had

Mr. Zollino been aware of the constitutional requirements for determining a sentence under the Sentencing Guidelines and had he not been facing the threat of a pre-Booker guideline sentencing scheme, he would not have entered into such a plea agreement and the result would have been different. It is now known, under United States v. Booker, that Mr. Zollino had strong grounds to object to the use of the guidelines in determining his sentence and that, had the District Court, under the PSR as produced in the case, sentenced Mr. Zollino under the Sentencing Guidelines and in accordance with the Sixth Amendment, prohibiting enhancements unless proven beyond a reasonable doubt to a jury, the sentencing range under the guidelines would have been significantly lower (21-27 months as opposed to 188-235 months) and Mr. Zollino would not have had the same reason to agree to a 144 month sentence under Fed. R. Crim. P. 11(c)(1)(C).

Failure to Raise Sentencing Complaints on Direct Appeal

The district court also stated that the failure of Mr. Zollino to raise the sentencing errors which resulted in the increased offense level under the Sentencing Guidelines had not been raised by him on direct appeal. As a result, the court stated that when a petitioner fails to raise an issue on direct appeal, collateral review is barred unless the petitioner demonstrates cause for that failure and actual prejudice as a result of the alleged violation of federal law, citing Edwards v. Carpenter, 529 U.S. 446, 451 (2000); and United States v. Cervantes, 132 F.3d 1106, 1109 (Rec. Vol.4,p.27). Mr. Zollino can show cause for the failure to raise his sentencing objections on direct appeal. As part of his plea agreement Mr. Zollino executed an appeal waiver. However, that waiver was ineffective because the district court failed to admonish him regarding the appeal waiver at the time of the entry of the guilty plea. United States v. Robinson, 187 F.3d 516, 517-

518(5th Cir. 1999)(Rec. Vol.9).

Mr. Zollino, who did not have post-conviction benefit of counsel, was not aware of this fact and did not file an appeal. The instant case is different from the situation cited in the Magistrate's Memorandum and Recommendation in Garcia-Santos v. United States, 273 F.3d 506, 508 (2d Cir.2001)(Rec. Vol. 4, p. 27). In that case the court found that a waiver of appeal did not constitute cause for failing to appeal the sentencing issues. However, in that case the court found that the defendant had entered into his plea agreement knowingly and voluntarily and with awareness of his waiver of appeal and collateral attack. Garcia-Santos v. U.S., 273 F.3d 506,508 (2d Cir. 2001). In the instant case, such a finding would be inappropriate as the district court failed to admonish Mr. Zollino regarding his appeal waiver and therefore the waiver cannot be seen as effective. Thereafter, because of Mr. Zollino's lack of counsel post-conviction he was not aware that he had the right to appeal and therefore did not raise these issues on appeal.

Such constitutes cause for failing to appeal the sentencing issues. As a result, the district court erred in adopting the Memorandum and Recommendation of the Magistrate that collateral relief was barred as to the sentencing issues. The Memorandum and Recommendation concluded that due to the waiver Zollino would only be entitled to relief if he could establish a fundamental miscarriage of justice (Rec. Vol., p. 27). The lower court was incorrect, he was not required to meet that standard.

Impact of United States v. Booker

Petitioner has contended that based on this Court's decision in United States v. Booker, the sentencing level determination employed in the District Court was improper and was a violation of Petitioner's Sixth Amendment right to a jury

trial. Had the District Court followed the requirements of the Sixth Amendment in determining Petitioner's offense level under the United States Sentencing Guidelines, the offense level would have been significantly reduced.

Petitioner Asserted in the Court of Appeals that His Sixth Amendment Claim Could Be Addressed on Collateral Review and That His Sixth Amendment Claim was Reviewable As Plain Error

This Court's decisions in United States v. Booker, and Blakely v. Washington, should be seen as a new rule that has retroactive application to cases on collateral review. In Blakely, this Court explained that the statutory maximum for Apprendi purposes is the maximum sentence a Judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the Defendant. Blakely, Id. The definition of statutory maximum sentence in Blakely is not limited to the maximum sentence identified by the legislature in a criminal statute. Instead, the sentencing court is limited to the highest sentence authorized by facts found by the jury or admitted by the Defendant at a plea hearing, whether those facts may be sentencing factors or the elements of the crime listed by the legislature, and whether the maximum sentence may be stated in sentencing guidelines or in a statute. In Booker, this Court held that the rule announced in Blakely applies to the United States Sentencing Guidelines.

Blakely and Booker were not dictated by precedent, and thus represent a new constitutional rule of criminal procedure under Teague v. Lane, 489 U.S. 288, 299-301 (1989), which should apply retroactively. In Teague, this Court recognized the general principal that new procedural rules are not applied retroactively to cases on collateral review, but identified an exception for "watershed" decisions critical to the fundamental fairness and accuracy of the criminal process. 489 U.S. at 311.

As this Court has clarified, this exception "give[s] retroactive effect to only a small set of watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. That a new procedural rule is fundamental in some abstract sense is not enough; the rule must be one without which the likelihood of an accurate conviction is seriously diminished. This class of rules is extremely narrow and it is unlikely that any..."has yet to emerge." Schriro v. Summerlin, 2004 WL 1402732 (June 24, 2004)(quoting Saffle v. Parks, 494 U.S. 484, 495 (1990) (quoting Teague, 489 U.S. at 311) and Tyler v. Cain, 533 U.S. 656, 667 n.7 (2001) (emphasis in Summerlin).

In Summerlin, decided the same date as Blakely, this Court ruled that Ring v. Arizona, 536 U.S. 584 (2002), was not retroactively applicable to cases on collateral review. In Ring this Court applied Apprendi to require jury findings of aggravated facts supporting a death sentence, but the only issues involved the identity of the factfinder, since the statute at issue there already required the judge to make findings of aggravated facts supporting death beyond a reasonable doubt. Ring, 536 U.S. at 597, 609. In turn, thus, Summerlin involved the finder of fact but not the standard of proof, Summerlin, 2004 WL 1402732 at 2n.1. Writing for the majority, Justice Scalia states in Summerlin that "[t]he right to jury trial is fundamental to our system of criminal procedure," Id. at 7, and as the dissenting justices note, "[t]he majority does not deny that Ring meets the first criterion of Teague, that is holding is "implicit in the concept of ordered liberty." Id. The Court declined to find retroactivity instead on a secondary inquiry involving accuracy, explaining that the question was not whether juries or judges were more accurate findings of fact, but "whether judicial factfinding so "seriously diminishes" accuracy that there is an "impermissibly large risk" of punishing conduct the law does not reach." Summerlin, 2004 WL 1402732 at 5 (quoting Teague, 312-13 (quoting Desist v. United States, 394 U.S. 244, 262 (1969) (Harlan, J.

dissenting)). The Court found the evidence to be "simply too equivocal to support that conclusion." Id.

In contrast to Ring, Blakely and Booker's application to the federal Sentencing Guidelines requires jury findings beyond a reasonable doubt. This Court explained the crucial nature of this right in In re Winship:

> The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error...'[A] person accused of a crime...would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case'...
>
> There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value–as a criminal defendant his liberty–this margin of error is reduced as to him by the process of placing on the other party the burden of...persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of...convincing the factfinder of his guilt.' To this end, the reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.'

In re Winship, 397 U.S. 358, 363-64 (1970) (citations omitted). A defendant who exercised the right to jury trial is

also protected by the right to confront witnesses, to remain silent, to compel the presence of witnesses and to present a defense, as well as evidentiary rights such as hearsay rules. If a defendant pleads guilty, proceedings under Fed. R. Crim. P. 11 require the court to obtain a waiver from the defendant of those rights explicitly–and in person. As recognized in Blakely, the right not to have one's maximum sentence substantially increased absent these protections is equally as crucial to liberty and due process as the right not to be convicted without such protections. Federal sentencing proceedings conducted without a reasonable-doubt standard of proof, and without the evidentiary and other rights granted at trial or at a plea hearing, are seriously lacking in those protections that serve to promote factual accuracy. See e.g., United States v. Green, 2004 WL 1381101, 33, 35 (D.Mass June 18, 2004) ("Although the First Circuit has denied "that the Apprendi rule can be characterized as a watershed rule of criminal procedure," there can be little doubt that the requirement of proof beyond a reasonable doubt and the right to have a jury determine facts that expose a defendant to greater punishment are among the surest guarantees that an individual will not be deprived of her liberty in error" (citing United States v. Sepulveda, 330 F. 3d 55, 60 (1st Cir. 2003)), also noting confrontation and other rights associated with jury trial). In contrast to the right to have a jury instead of a judge decide a particular fact, judicial factfinding by a preponderance of the evidence, in many cases based on hearsay, "so seriously diminishes] accuracy that there is an "impermissibly large risk" of punishing conduct the law does not reach." Summerlin, (citing Teague, 312-13 and Desist, 394 U.S. at 262). Accordingly, it should be found that Blakely and Booker, in contrast to Ring, recognize a new watershed rule of constitutional procedure applicable to cases pending on collateral review.

Mr. Zollino did not specifically raise the Sixth Amendment issue from Blakely v. Washington in his

complaints about his sentence in his motion under 28 U.S.C.§2255.

Where an Appellant has not lodged a contemporaneous objection to the trial court, an appellate court may reverse only if the district court committed plain error. Plain error review is mandated by Federal Rule of Criminal Procedure 52(b). Before considering reversal under that rule, the Appellate Court must first find that the district court committed an unwaived error. Waiver is an intentional relinquishment or abandonment of a known right. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). The error must be plain, that is, clear and obvious under current law. Current law means the law prevailing at the time of appeal. United States v. Webster, 84 F.3d 1056,1067 (8th Cir. 1996). Mr. Zollino submitted this issue due to a change in law that occurred during the pendency of his appeal.

Finally, Mr. Zollino must show that the error affected his substantial rights by prejudicially influencing the outcome of the district court proceedings. United States v. Olano, 507 U.S. 725, 732-735 (1993). An appellate court should exercise its discretion to correct unpreserved errors in the Appellant's favor where the error seriously affects the fairness, integrity or public reputation of judicial proceedings. Id. at 736. Mr. Zollino presented his arguments on the sentencing error in his case in light of the decision in United States v. Booker, to illustrate how his substantial rights to a fair and constitutionally mandated procedure were adversely affected and how such errors seriously affected the fairness, integrity and public reputation of judicial proceedings.

CONCLUSION

WHEREFORE, Petitioner Jose Zollino respectfully requests that this Honorable Court grant this petition and issue a Writ of Certiorari and review the decision of the United States Court of Appeals for the Fifth Circuit denying the issuance of a Certificate of Appealability and review the question of whether the Court of Appeals should have issued

a Certificate of Appealability on his question raised for the first time in the Motion for Issuance of Certificate of Appealability as to whether he is entitled to a new sentencing hearing based on the decisions of this Court in Blakely v. Washington and United States v. Booker.

Respectfully submitted,

John F. Carroll
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San Antonio, Texas 78212
(210) 829-7183
Counsel for Petitioner Jose Zollino

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
FEB 14 2005
CHARLES R. FULBRUGE III
CLERK

No. 04-50378

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

JOSE ZOLLINO,
Defendant - Appellant.

Appeal from the United States District Court
for the Western District of Texas, San Antonio

Before JOLLY, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:

A member of this panel previously denied the appellant's motion for certificate of appealability. The panel has considered appellant's motion for rehearing as a motion for reconsideration. IT IS ORDERED that the motion is DENIED.

MOT-29

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
JAN 11 2005
CHARLES R. FULBRUGE III
CLERK

No. 04-50378
USDC No. 5:03-CV-986
USDC No.: 01-CR-180-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSE ZOLLINO,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

O R D E R:

Jose Zollino, federal prisoner # 55356-053, moves for a certificate of appealability (COA) to appeal the denial of his 28 U.S.C. §2255 motion challenging his fraud and money laundering convictions. He raises the following arguments: (1) his sentence violated Blakely v. Washington, 124 S. Ct. 2531 (2004); (2) ineffective assistance of counsel rendered his guilty plea involuntary; (3) he was denied effective assistance of counsel at sentencing; (4) the district court erred in determining that his restitution claim was not cognizable on §2255 review; and (5) the district court erred in failing to

consider a downward departure based on the disparity in the sentences of Zollino and his co-defendant.

Zollino, however, has not shown "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.: See Slack v. McDaniel, 529 U.S. 473,484 (2000), His COA motion is therefore DENIED.

/s/
E. GRADY JOLLY
UNITED STATES CIRCUIT JUDGE

FILED
August 10 2004
Clerk, U.S. District Court
Western District of Texas
By /s/
Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOSE ZOLLINO Movant,	)	
vs.	)	Civil Action No.:SA-03-CA-0986-XR
UNITED STATES OF AMERICA, Respondent.	)	Criminal Case [SA-01-CR-180(1)-EP]

ORDER

Movant Jose Zollino's Notice of Appeal (Docket Entry #213), construed as an application for certificate of appealability to appeal this Court's denial of his 28 U.S.C.§2255 Motion to Vacate, Set Aside, or Correct Sentence, is **DENIED** for the reasons stated in the Magistrate Judge's Report and Recommendation (Docket Entry #201) and this Court's Order accepting the Recommendation and denying the Motion (Docket Entry#212). Movant's Motion and appeal fail to make "a substantial showing of the denial of a federal right" as required by Fed.R.App.P.22 for such a certification. *See Slack v. McDaniel*, 529 U.S. 473,483, 120 S. Ct. 1595,146 L.Ed.2d 542(2000).

DATED: August 16, 2004

/s/
XAVIER RODRIGUEZ
United States District Judge

FILED
March 29,2004
Clerk, U.S. District Court
Western District of Texas
By /s/
Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOSE ZOLLINO	)	
Movant,	)	
vs.	)	Civil Action No.:SA-03-
	)	CA-0986-XR
UNITED STATES OF	)	
AMERICA,	)	
Respondent.	)	

ORDER

On this day the Court considered the Magistrate's Memorandum and Recommendation, filed January 22,2004, and Defendant's Objections to the report. After careful consideration, the Court will ACCEPT the Magistrate's recommendations and OVERRULE Defendant's objections (docket no. 201). Accordingly, for the reasons set forth below, Zollino's Motion to Vacate Sentence (docket no.186) is DENIED. Zollino's Request for a hearing on post-judgment garnishment (docket no. 178) is DENIED. The Government's motion to dismiss the Merrill Lynch garnishment (docket no. 180) is GRANTED, but Merrill Lynch's request for attorney's fees is DENIED.

Standard of Review

When a party objects to a Magistrate Judge's Report and Recommendation, the District Court conducts a de novo review. 28 U.S.C. §636(b)(1).

Defendant's Objections

Defendant pled guilty to Counts 1 and 12 of a Superceding Indictment which charged him with conspiracy to commit fraud and conspiracy to launder monetary instruments. Despite the fact that the sentencing guidelines called for a range of confinement between 188 and 235 months, the Court accepted a plea agreement negotiated between Defendant's counsel and Government and sentenced Defendant to 144 months. FED.R.CRIM.P.11(e)(1)(c)(currently FED.R.CRIM.P.11(c)).[1] Defendant complains of ineffective assistance of counsel, that his guilty plea was not made knowingly or voluntarily, that the length of his sentence was improperly calculated, and that the order requiring him to pay restitution in excess of $341 million was improper.

1. Ineffective Assistance of Counsel Claim

Defendant argues that his attorney was ineffective, failed to meaningfully review documents, and failed to adequately conduct an investigation and interview of witnesses.[2] As a result he argues that he "asked him to

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[1]The prior rule is referred to throughout.

[2]The plea agreement signed by the defendant contained in a waiver of a right to appeal his sentence on any ground, including any appeal right conferred by 18 U.S.C. §3742. The defendant further agreed not to contest

withdraw from the case." A review of this case indicates that Defendant's counsel entered an appearance on April 17, 2001. On May 10,2002, Defendant signed a plea agreement, which was filed on May 13, 2002. In that plea agreement, Defendant agreed to plead guilty to Counts 1 and 12 of the Superceding Indictment. He was represented by counsel at that time. In addition, the file in this case indicates that Defendant was represented by the same counsel at the rearraignment and plea hearing held on May 15, 2002, as well as at sentencing on October 9, 2002. Despite the fact that the sentencing guidelines called for a range of confinement between 188 months to 235 months, pursuant to Rule 11(e)(1)(c), the Court accepted the plea agreement negotiated between Defendant's counsel and the Government and sentenced Defendant to 144 months.

For Defendant to proceed with an ineffective assistance of counsel claim, he must show both cause–a serious professional error by his lawyer–and prejudice–some harm resulting from the error. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "As for cause, the Court must determine whether counsel's performance was reasonable considering all of the circumstances at the time." *Id.* at 688-90. The court must further "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689(citation omitted).

When a defendant challenges a guilty plea based on ineffective assistance of counsel, the "prejudice" requirement "focuses on whether counsel's constitutionally ineffective

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his sentence in any post-conviction proceeding, including but not limited to a proceeding under 28 U.S.C. §2255. The defendant, however, reserved the right to appeal a claim of ineffectiveness of counsel.

performance affected the outcome of the plea process." *Hill v. Lockhart*, 474 U.S. 52,59(1985). To satisfy this requirement in the plea context, the defendant "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* Moreover, in non-capital cases, to establish prejudice, the defendant must show there is a reasonable probability that absent counsel's errors, the defendant's sentence would have been significantly less harsh. *U.S. v. Segler*, 37 F.3d 1131,1136(5th Cir.1994).

Although courts must construe §2255 petitions liberally, "mere conclusory allegations on a critical issue are insufficient to raise a constitutional issue." *U.S. v. Pineda*, 988 F.2d 22,23(5th Cir.1993). It has long been the law and practice of this circuit that if a petitioner fails to properly raise a claim, including sufficient factual allegations or proof, the district court may properly deny and dismiss the petition. *U.S. v. Jones*, 614 F.2d 80,82(5th Cir.), *cert. denied*, 446 U.S. 945(1980). Here, the record reflects that a General Order of Discovery was entered into by the Court. It required the Government to make available a wide variety of documents. Defendant fails to identify any specific instance where critical documents were withheld. Nor does Defendant even identify what documents his attorneys failed to locate and review. Defendant does not articulate with any specificity how his pre-trial detention was due to the malpractice of his attorney. Although Defendant identifies two witnesses his attorneys allegedly failed to interview, he does not provide any specificity as to the importance of the testimony of those witnesses. Thus, these conclusory allegations do not satisfy either element for an ineffective assistance of counsel claim.

In addition, in *U.S. v. White*, 307 F.3d 336(5th Cir.2002), the Fifth Circuit held "that an ineffective assistance of counsel argument survives a waiver of appeal only when the claimed assistance directly affected the validity of that waiver

or the plea itself." *Id.* at 343. Further, to apply that standard the Court must "ask whether the plea or waiver itself was knowing or voluntary, and whether the issue challenged on appeal may properly be the subject of waiver. If the answer to both questions is 'yes,' then the guilty plea sustains the conviction and sentence and the waiver can be enforced." *Id.* at 343-44(footnote omitted). Further, the Court noted that "if all ineffective assistance of counsel claims were immune from waiver, any complaint about the process could be brought in a collateral attack by merely challenging the attorney's failure to achieve the desired result. A knowing and intelligent waiver should not be so easily evaded." *Id.* at 344. Thus, the Defendant also contends that because his plea was not knowingly and voluntarily entered into, his counsel was ineffective.

a. Defendant knowingly and voluntarily entered into his plea

Defendant objects to the Magistrate Judge's recommendation that he knowingly and voluntarily entered into his guilty plea. Defendant argues that his plea was not entered knowingly and voluntarily because: (1) a search warrant seized all his personal and business records and he was denied meaningful access to these records; (2) he was held in pre-trial detention without bail; (3) his wealth and assets were seized by the Receiver and he was not able to pay attorney's fees; (4)his case was "complex and document intensive," his attorneys pressured him to accept a plea because they did not want to proceed to trial unprepared; and (5) the uncertainty and concern for his family "unsettled" him in some unspecified manner.

This Court has reviewed the Rule 11 colloquy of May 15,2002. Without a doubt, Defendant's plea was knowingly and voluntary. Defendant acknowledged that he had sufficient time to discuss his case with his counsel. He stated, under oath, that his plea agreement was fully explained to him, and

that he understood the agreement. He expressed satisfaction with his attorneys' representation of him. He acknowledged that he had read Counts 1 and 2 of the Superceding Indictment, and that his attorney also explained the charges to him. During the plea hearing, the Assistant United States Attorney provided verbal

recitation of the facts the government intended to prove should the case proceed to trial. The Defendant agreed with the facts recited, but disputed some of the monetary figures which would relate to the amount of losses. After all his rights were explained to him by the Court, and all possible punishment was explained by the Court, Defendant plead guilty of his own free will.

Because Defendant was aware of the charges pending against him, and the consequences of entering into a guilty plea, his plea was knowingly and voluntarily entered into. His complaint of ineffective assistance of counsel, both in general and in connection wit his plea agreement, are merely conclusory. Thus, his claims of mental coercion and ineffective assistance of counsel are OVERRULED.

b. Alleged sentencing errors

Defendant argues that the sentencing judge erred by increasing his offense level by four points under Section 3B1.1(a) of the sentencing guidelines (known as the organizer or leader provision). Defendant argues that this section only applies to a case where there is five or more participants. He also complains that his offense level was increased by thirteen points under section 2S1.1(b)(2)(known as the amount of loss provision). He argues that there was no evidence to support the calculation of $420 million in losses.

Defendant complains that his attorney rendered ineffective assistance by failing to complain about these alleged incorrect increases. As discussed above, however, Defendant was sentenced to 144 months imprisonment pursuant to an agreement under Rule 11(e)(1)(C). Pursuant to

that, Defendant agreed to a specific sentence. Once the court accepted the plea agreement, Defendant's agreement with the Government was biding upon the sentencing judge. The calculation of Defendant's offense levels was thus irrelevant. This issue then becomes was Defendant's counsel rendering ineffective assistance in allowing Defendant to enter into his plea and Rule 11(e)(1)(C) agreement? For the reasons stated above, this Court

concludes that Defendant has not established an ineffective assistance of counsel claim and provides mere conclusory allegations of the same.

In addition, the Magistrate Judge correctly concludes that Defendant has not established prejudice. Even assuming that the $420 million calculation for amount of monies laundered was inaccurate, the increase of 13 levels was appropriate for any amount over $100 million. Defendant has failed to produce any evidence establishing that the money laundering amounts were below $100 million. The presentence report described the use of "circular transactions" involving $139 million. During the plea hearing, the Government submitted "from 1993 to 1999, hundreds of millions of dollars were sent through circular transactions, including specifically approximately $272,00,000 that were transferred out of the country and then returned in December of 1997 and January 1998." Thus, the increase of 13 levels was appropriate.

The Magistrate Judge also correctly concluded that a motion to vacate sentence is not the appropriate vehicle to contest alleged sentencing errors. Defendant was required to challenge any sentencing errors by direct appeal and failed to do so. *U.S. v. Segler*, 37 F.3d 1131 (5th Cir. 1994)("A district court's technical application of the Guidelines does not give rise to a constitutional issue cognizable under §2255. Applying the §4B1.1 criteria to determine whether to sentence as a career offender does not implicate any constitutional issues. Moreover, this claim could have been raised on direct appeal.

Accordingly, Segler is not entitled to §2255 relief.")(citations omitted). Thus, Defendant's alleged sentencing errors afford him no relief and are improperly raised by his motion.

2. Sentencing Disparity

Defendant argues that he should be granted downward departure because of disparity between his 144 month sentence and the 84 month sentence imposed on co-defendant George Fahey. There is no merit to Defendant's claim. The government filed a 5K1.1 motion for departure, and such motion was granted because Fahey offered substantial assistance and cooperation to the Government. *U.S. v. Meza*, 127 F.3d 545 (7th Cir. 1996). Further, as noted above, Defendant agreed to his 144 month sentence. There is no claim of prosecutional misconduct made by Defendant to justify a review of any sentencing disparity. *U.S. v. Yeaman*, 248 F.2d 223 (3d Cir. 2001).

3. Restitution Claim

Finally, Defendant complains that the Court did not wait 120 days before deciding the issue of restitution, that the correct amount was not calculated by the Probation Office, that the correct amount is still not known today, an that the restitution order violated 18 U.S.C. §3664 and Federal Rules of Criminal Procedure 32 and 35.

During the October 9, 2002, sentencing hearing the Court ordered restitution, found that the number of investors defrauded totaled at least 1600 investor accounts, and that there were losses totaling approximately $420,487,496.[3] Defendant's counsel, however, informed the sentencing judge that the actual amount owed in restitution was still uncertain because the Receiver for the bankrupt corporation had recovered some monies and had distributed certain amounts to victims.

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[3]Prior to sentencing and during the plea hearing in this matter, the Defendant understood that restitution was in the "ballpark figure" of $325 million. Transcript of Plea Hearing, May 15, 2002 at pp.13, 19-20.

Defendant's counsel then argued that the Defendant should receive an offset or credit for any such monies restored to the victims. The Court agreed with Defendant's counsel and stated that he would "leave open the issue of how much should be offset by pending matters and will hear–will wait to hear from the attorneys with regard to that matter...." At another point during the hearing the sentencing judge announced he would waive 120 days before resolving how much restitution was due and owing. However, on October 28, 2002, only 19 days later, the sentencing judge entered a Judgment ordering the restitution in the amount of $341,787,496.

The Magistrate Judge concluded that the defendant's appeal waiver, contained in this written plea agreement, waived any right to appeal the restitution order. Inasmuch as restitution was not specifically addressed in the written plea agreement, this Court finds that the waiver only applied to the sentencing issues contained in that agreement. Thus, the Court rejects this limited recommendation by the Magistrate Judge.

In the alternative, the Magistrate Judge concluded that a person in federal custody may not bring a §2255 motion to attack the restitution portion of his sentence. This Court agrees with that conclusion. Because an order to correct restitution is not an order for release from custody, relief from a restitution order is not a remedy authorized by the statute. the terms of 28 U.S.C. §2255 provide:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to

vacate, set aside or correct the sentence.

28 U.S.C. §2255. The Fifth Circuit Court of Appeals is consistent with other circuit courts in holding that §2255 may not be utilized for the purpose of attacking fines and orders of restitution. *U.S. v. Hatten*, 167 F.3d 884,887 (5th Cir. 1999); *U.S. v. Segler*, 37 F.3d 1131, 1136-37(5th Cir.1994). In *Segler*, the Fifth Circuit concluded that "§2255's limitation on who may seek release from federal custody also implies a limitation on the claims they may assert to obtain a release." *Id.* at 1137. Thus, Defendant cannot seek relief from the Court's restitution order through this collateral proceeding.

Conclusion

It is ORDERED that the Memorandum and Recommendation of the Magistrate Judge is ADOPTED (docket no. 201).[4]Defendant's Motion to Vacate Sentence (docket no. 186) is DENIED. Defendant did not object to the Magistrate Judge's Recommendation regarding Defendant's Request for a hearing on post-judgment garnishment (docket no. 178). Accordingly, such request (docket no.178) is DENIED. The Government's motion to dismiss the Merrill Lynch garnishment (docket no. 180), also not objected to by Defendant, is GRANTED, but Merrill Lynch's request for attorney's fees is DENIED.

SIGNED this 29th day of March, 2004.

/s/
XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE

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[4]With the sole exception that this Court does not adopt the Magistrate Judge's conclusion that Zollino's appeal waiver contained in his written plea agreement waived any right to appeal the restitution order.

FILED
January 22 2004
Clerk, U.S. District Court
Western District of Texas
By /s/
Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOSE ZOLLINO	)	
Movant,	)	
vs.	)	Civil Action No.:SA-03-
	)	CA-0986-XR
UNITED STATES OF	)	[SA-01-CR-180(1)-EP]
AMERICA,	)	
Respondent.	)	

MEMORANDUM AND RECOMMENDATIONS

In this motion to vacate sentence, filed pursuant to Title 28 U.S.C. Section 2255, Jose Zollino challenges his 2002 convictions for conspiracy to commit fraud and conspiracy to commit money laundering. (Docket nos. 186,187). He claims that (1) his attorney rendered ineffective assistance, (2) the District Court erred in increasing his offense level under Section 3B1.1(a) of the Sentencing Guidelines as an organizer or leader, (3) the District Court erred in enhancing his offense level by 13 points under Section 2S1.1(b)(2) when the amount of loss was not proven, (4) the District Court erred in its restitution order, and (5) he should have received a downward departure because of this disparity between his sentence and

the sentence of his codefendant. Having considered the motion, the government's response (docket no. 193), Zollino's reply (docket no. 195), and the applicable law, the Court is of the opinion the motion to vacate should be denied.

BACKGROUND

On March 22, 2001, Zollino was indicted for conspiracy to commit fraud, conspiracy to launder monetary instruments, securities fraud, mail fraud, wire fraud, bank fraud, and money laundering. (Docket no. 3). A superseding indictment was subsequently returned. (Docket no. 81). Pursuant to a plea agreement filed May 13, 2002 (docket no. 107), he pled guilty to Count One charging him with conspiracy to commit money laundering. On October 9, 2002, Zollino was sentenced to serve 60 months of imprisonment on Count One and 144 months of imprisonment on Count Twelve to run concurrently. (Docket no. 138). The remaining charges were dismissed. He did not appeal. The motion to vacate sentence now before the Court was filed October8, 2003.

The charges arose from the actions of Zollino as Chairman of the Board of InverWorld, a company which offered investment advice and services to clients located in foreign countries, primarily in Mexico. In the early 1990s, InverWorld became insolvent. In order to keep the business operating, investors were induced to transfer funds to InverWorld through misrepresentations that the money would be properly invested. In fact, the funds were used to pay operating expenses, to serve as collateral for loans, to pay off earlier investors, and to pay substantial salaries and other benefits to Zollino and other conspirators. To conceal the nature of their activities, Zollino and other conspirators transferred funds back and forth from domestic institutions to offshore institutions, causing the audit reports to appear clean and the company to appeal solvent.

Analysis

1. District Court Sentencing Errors

Zollino alleges that the District Court erred in increasing his offense level by 4 points under Section 3B1.1(a) of the Sentencing Guidelines as an organizer or leader, and by increasing his offense level by 13 points under Section 2S1/1(b)(2) based upon the alleged amount of the loss. Neither of these issues is cognizable in this proceeding. Section 2255 provides relief if the federal petitioner can establish that: (1) his sentence was imposed in violation of the Constitution or laws of the United States, (2) the court was without jurisdiction to impose such sentence, (3) the sentence was in excess of the maximum authorized by law, or (4) the sentence is otherwise subject to collateral attack. A motion to vacate sentence is not the appropriate means for contesting a district court's sentencing determination; it is neither a constitutional nor jurisdictional issue. Thus, a district court's calculation under or application of the Sentencing Guidelines standing alone is not the type of error that is cognizable under Section 2255. **United States v. Cervantes,** 132 F.3d 1106,1109 (5th Cir. 1998); **United States v. Payne,** 99 F.3d 1273, 1281 (5th Cir. 1996).

While a District Court sentencing error can be raised on direct appeal, Zollino, as noted above, did not appeal. When a petitioner fails to raise an issue on direct appeal, collateral review is barred unless the petitioner demonstrates cause for that failure and actual prejudice as a result of the alleged violation of federal law. **Edwards v. Carpenter**, 529 U.S. 446, 451 (2000); **United States v. Cervantes**, 132 F.3d 1106, 1109 (5th Cir. 1998). Although Zollino waived his right to appeal as part of his plea agreement, that waiver does not constitute cause for failing to appeal the sentencing issues. **Garcia-Santos v. United States**, 273 F.3d 506,508(2nd Cir. 2001). In the absence of cause and prejudice, Section 2255 can provide relief only if the failure to consider the claim would result in a fundamental miscarriage of justice. **Edwards**, 529 U.S. at 451. A "fundamental miscarriage of justice" occurs when a factually innocent person is convicted. **Murray v. Carrier**, 477 U.S. 478,495-496(1986). Zollino odes not claim that he is factually

innocent of the charges of which he was convicted. Thus, he has forfeited his claims that the District Court committed errors at the time of sentencing.

2. Ineffective Assistance of Counsel

Zollino alleges that his attorneys that his attorneys rendered ineffective assistance in failing to file pretrial motions, failing to obtain access to bankruptcy documents, failing to conduct an investigation, and failing to interview and procure witnesses. He states that his attorneys failed to seek a speedy trial, and that his lengthy incarceration impaired his ability to defend his case. Zollino assets that two witnesses, Norma Renteria-Platz and Mary Johnson, died before their testimony could be preserved. He states that, as a result of his attorney's lack of preparation, he was left with no choice other than to accept the plea agreement and plead guilty.

Zollino also contends that his attorneys were ineffective at sentencing for not challenging the amount of loss of $420,487,494 included in the presentence investigation report (PSIR). He states that the figure used represents the total assets under management as opposed to the amount directly linked to the offenses. Zollino also argues that his attorneys should have contested the District Court's enhancement of his offense level by 13 points under Section 2S1.1(b)(2) of the Sentencing Guidelines based upon the alleged amount of the loss.

a. Waiver

The government contends that Zollino has waived his right to present these claims because he agreed to waive his right to appeal and to file a Section 2255 motion as part of his plea agreement. However, the plea agreement specifically expected from that waiver claims of ineffective assistance of counsel. Although the government asserts that Zollino is attempting to avoid the wavier by artful pleading, the Court finds that Zollino's claims of ineffective assistance of counsel have not been waived.

Although the plea agreement did not operate to waive

Zollino's ineffective assistance of counsel claims, a legal bar does exist. A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence. **United States v. Broce**, 488 U.S. 563, 569(1989). Thus, when the judgment of conviction upon a guilty plea becomes final and the offender seeks to challenge the proceeding, the inquiry is ordinarily confined to determining if the plea was knowingly and voluntarily entered. **Id**. If so, the collateral attack is foreclosed. **Id**. A voluntary guilty plea waives all nonjurisdictional defects in the proceedings, including a claim of the ineffective assistance of counsel, except insofar as the ineffectiveness is alleged to have rendered the guilty plea involuntary. **United States v. Glinsey**, 209 F.3d 386, 392 (5th Cir. 2000). In a situation where the defendant has waived his right to appeal, an ineffective of assistance of counsel claim survives such a waiver only when the claimed assistance directly affected the validity of that waiver or the plea itself. **United States v. White**, 307 F.3d 336,343(5th Cir. 2002)(claim of ineffective assistance of counsel at sentencing waived by plea agreement).

Zollino has ambiguously raised a claim of ineffective assistance of counsel as regards to the voluntariness of his plea, as well as a specific complaint of counsel's assistance at sentencing. Although the former claim is not barred, it has no merit. To obtain relief on a claim of ineffective assistance of counsel, the petitioner must demonstrate that his counsel was deficient and that the deficiency prejudiced his defense. **Strickland v. Washington**, 466 U.S. 668,687(1984). In the context of a guilty plea, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. **Hill v. Lockhart**, 474 U.S. 52,59 (1985).

Zollino's allegations fall far short of meeting this standard. He states that his attorneys rendered ineffective assistance in failing to file pretrial motions, failing to obtain

access to bankruptcy documents, failing to conduct an investigation, and failing to interview and procure witnesses. Counsel has a duty to make a reasonable investigation of defendant's case or make a reasonable decision that a particular investigation is unnecessary. **Strickland**, 466 U.S. at 691. As support for this claim, Zollino was required to specify what the investigation would have disclosed and why it would have been likely to make a difference at trial. **Anderson v. Collins**, 18 F.3d 1208,1221 (5th Cir. 1994). Brief and conclusory allegations that counsel's representation was deficient because of his failure to investigate and develop useful evidence will not suffice. **Id.**

Zollino's claim is, for the most part, conclusory. Other than to suggest that a speedy trial should have been pursued, he failed to cite any pretrial motion which his attorneys could have filed which would have benefitted his defense. He does not specify what the bankruptcy documents[5] would have shown or what investigation should have been conducted. While he does name two witnesses, Norma Renteria-Platz and Mary Johnson, who could have been contacted before becoming available, he does not suggest what exculpatory testimony either of them would have provided. Complaints based upon uncalled witnesses are not favored. **Sayre v. Anderson**, 238 F.3d 631, 635-36(5th Cir.2001). To prove prejudice from counsel's failure to call certain witnesses, the defendant must identify those witnesses and establish, by affidavit or otherwise, what those witnesses would have testified to at trial. **Id.** Zollino has not met this burden.

Zollino's assertion that he was left with no choice but to accept the plea agreement and plead guilty is wholly unsupported. To be constitutionally valid, a guilty plea must be

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[5]The government responds that Zollino's counsel was, in fact, taken to the bankruptcy receiver's office and was given unlimited access to the bankruptcy documents.

intelligent and voluntary. **Bousley v. United States**, 523 U.S. 614, 618 (1998). To be voluntary, a guilty plea must not be produced by actual or threatened physical harm or by mental coercion overbearing the will of the defendant or of state-induced emotions so intense that the defendant was rendered unable to weigh rationally his options with the help of counsel. **Matthew v. Johnson**, 201 F.3d 353,365(5th Cir. 2000). For a guilty plea to be intelligently entered, the defendant must be competent, have notice of the nature of the charge against him, and understand the consequences of a guilty plea, including the nature of the constitutional protection he is waiving. **Id.** at 364-365. To understand the consequences of a guilty plea, the defendant must know the maximum prison term and fine for the offense charged. **United States v. Guerra**, 94 F.3d 989,995(5th Cir. 1996).

Zollino does not contend that he was unaware of the nature of the charges and penalties or the consequences of pleading guilty. He does not assert that either his agreement to the plea bargain or his guilty plea was produced by actual or threatened physical harm, nor does he claim that they were prompted by government-induced emotions so intense that he was rendered unable to weigh rationally his options with the help of counsel. There is no proof that his guilty plea was motivated by mental coercion overbearing his will. in the absence of a showing of deficient performance and prejudice by his attorneys, Zollino's claim that ineffective assistance of counsel rendered his guilty plea involuntary is without merit. It follows that his claims of ineffective assistance of counsel at sentencing are barred. **White**, 307 F. 3d at 343.

b. Errors at Sentencing

Alternatively, the Court finds that Zollino's claims of ineffective assistance of counsel at sentencing are without merit. He contends that his attorneys were ineffective ast sentencing for not challenging the amount of loss of $420,487,494 included in the presentence investigation report

(PSIR). He states that the figure used represents the total assets under management as opposed to the amount directly linked to the offenses. Zollino also argues that his attorneys should have contested the District Court's enhancement of his offense level by 13 points under Section 2S1.1(b)(2) of the Sentencing Guidelines based upon the alleged amount of the loss.[6]

Assuming that Zollino's attorneys should have contested the amount of loss, he cannot establish that he was prejudiced by that failure. As part of his plea agreement, Zollino and the government agreed, pursuant to Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure, that a sentence of 144 months would be the appropriate disposition of the case. As noted above, Zollino's agreement to that sentence was knowing and voluntary. In the case of Rule 11(e)(1)(C) agreement, computations under the Sentencing Guidelines lose their significance. Section 6B1.2(c) of the Sentencing Guidelines specifically authorizes the District Court, if justifiable reasons exist, to accept the proposed disposition even if the agreed sentence departs from the applicable guideline range. **See United States v. Goodall**, 236 F. 3d 700, 703-04 (D.C. Cir. 2001).

Additionally, even if the accuracy of the guideline computations set forth in the PSIR are relevant in providing the District Court with a basis for accepting or rejecting the Rule 11(e)(1)(C) agreement, Zollino has failed to establish that his range of punishment was improperly calculated. Under the 1998 Sentencing Guidelines applies in this case, Section 2S1.1(b)(2)(N) increases the offense level by 13 levels if the value of the funds which were the subject of the money laundering conspiracy exceeded $100,000,000. Although

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[6]Zollino's claim that the District Court erred in increasing his offense level as an organizer and leader under Section 3B1.1(a) of the Sentencing Guidelines was not raised as a claim of ineffective assistance of counsel.

Zollino challenges the accuracy of the $420,487,494 figure cited in the PSIR, he has not alleged that the appropriate value was less than $100,000,000. Thus, application of the 13 level increase was proper. Zollino has failed to establish that his attorneys rendered ineffective assistance of counsel at sentencing.[7]

3. Restitution

Zollino challenges the assessment of restitution. He alleges that the probation officer failed to conduct an investigation as required by Rule 32, Fed. R. Crim. P. and did not comply with 18 U.S.C. Section 3664 by filing a separate report with a complete accounting of victims and their losses. He contends that a determination should have been made as to the total amount of assets under management at the time of the InverWorld collapse and the assets found at InverWorld after the collapse.

Zollino also asserts that the $420,487,494 figure in the PSIR is inaccurate, and that no explanation is provided in the PSIR regarding how the $139,000,000, attributed to circular transactions, was determined. He complains that the District Court withheld a ruling on restitution at the time of sentencing and has not, as of the filing of the Section 2255 motion, entered an order of restitution. As a result, Zollino contends that the District Court lost the authority and jurisdiction to do so.

The PSIR indicates that the amount of loss totaled $420,487,496 and involved at least 1600 investor accounts. Lee B. Blackwell, the co-receiver for InverWorld, reported to the probation officer that $78,700,000 was recovered and disbursed to the victims. At the time of sentencing on October 9, 2002, the District Court noted the $420,487,496 figure but withheld

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[7]The Court notes that the applicable range of punishment computed under the Sentencing Guidelines was 188-235 months. The negotiated agreement of 144 months reduced Zollino's sentencing exposure by almost 4 years.

a ruling as to restitution pending the receipt of a report reflecting how much has been paid and how much is owed. On October 28, 2002, the District Court entered its judgment, directing that restitution in the amount of $341,787,496 ($420,487,496 minus $78,700,000) be paid to the InverWorld receiver.

Although the government addressed the restitution issue on its merits, it also argued that Zollino waived the right to challenge his sentence. As part of his plea agreement, Zollino agreed to "waive[] his right to appeal his sentence on any ground..." Whether an appeal waiver applies to a restitution order is not settled. Some courts have strictly construed appeal waivers in the context of a restitution order. **See United States v. Smith**, 344 F.3d 479,483 (6th Cir. 2003)(appeal waiver did not preclude appeal of restitution order when defendant agreed to "pay restitution for all losses resulting from his relevant offense conduct," and waiver extended to any sentence within the parameters of the agreement); **United States v. Rhodes**, 330 F. 3d 949,952 (7th Cir. 2003)(appeal waiver precluded appeal of restitution order when plea agreement reflected specific consideration of the restitution issue and provided explicit exception to the appeal waiver over the amount of the restitution); **United States v. Gamma Tech Industries, Inc.**, 265 F.3d 917,923 n.5(9th Cir.2001)(appeal waiver does not affect ability to appeal a violation of the restitution statutes); **United States v. Ready**, 82 F.3d 551,557(2nd Cir.1996)(appeal waiver did not preclude his right to appeal an illegally imposed restitution penalty); **United States v. Broughton-Jones**, 71 F.3d 1143,1147(4th Cir.1995)(appeal waiver does not affect ability to appeal a violation of the restitution statutes).

However, two circuits have held that a general appeal waiver precludes review of a restitution order. **United States v. Montgomery**, 78 Fed. Appx. 709,710, 2003 WL 22407432 at *1-2 (10th Cir.2003); **United States v. Greger**, 98 F.3d 1080, 1081(8th Cir.1996)(appeal waiver precluded appeal of

restitution order where defendant waived his right to appeal all issues). Although the Fifth Circuit Court of Appeals has apparently not yet decided this issue, this Court believes that **Montgomery** and **Greger** represent the better-reasoned view. No requirement exists that an appeal waiver includes ever specific issue to which it is intended to apply. In any event, Zollino's appeal waiver could hardly be more clear. He waived his right to appeal his sentence "on any ground." By voluntarily and knowingly agreeing to a broad waiver of appeal, an issue such as restitution should be considered only if it is specifically **excepted** from the waiver. This Court concludes that Zollino's appeal waiver bars consideration of the restitution issue.

Additionally, even if, in the face of an appeal waiver, a restitution order can be challenged on direct appeal, it is not a cognizable issue in a Section 2255 motion to vacate sentence. Unlike application of the appeal waiver, it is well-settled, in this circuit and most others, that a restitution order cannot be challenged in a Section 2255 proceeding because that statute only offers relief to a prisoner "claiming the right to be released." **United States v. Bernard**, 351 F.3d 360,361(8th Cir.2003); **Kaminski v. United States**, 339 F.3d 84,87 (2d Cir. 2003); **United States v. Kramer**, 195 F.3d 1129,1130 (9th Cir. 1999); **United States v. Hatten**, 167 F. 3d 884, 887 (5th Cir. 1999); **Blaik v. United States**, 161 F.3d 1341, 1342 (11th Cir.1998); **Barnickel v. United States**, 113 F.3d 704,706(7th Cir. 1997); **Smullen v. United States**, 94 F. 3d 20,25 (1st Cir.1996). This bar applies even if the restitution challenge is joined with claims which do concern a prisoner's release. **United States v. Thiele**, 314 F.3d 399,402(9th Cir. 2002), **cert. denied**, ___ U.S. ___, 124 S. Ct. 99,157 L.Ed.2d 72 (2003). Zollino's restitution claim cannot be considered in this proceeding.

4. Disparate Sentences

Finally, Zollino contends that he should be granted a downward departure because of the disparity between his

sentence of 144 months and the 84-month sentence of codefendant George Fahey. He asks that the Court apply the ruling in **Koon v. United States**, 518 U.S. 81 (1996). **Koon** concerned what factors a District Court could consider in determining whether a downward departure under the Sentencing Guidelines is warranted. Aside from noting that the goal of the Sentencing Guidelines is to reduce unjustified disparities, **Koon** did not address the issue Zollino raises here.

Assuming **arguendo** that Zollino is not barred from raising this claim, his argument provides no basis for relief. Generally, disparities in sentences among codefendants do not constitute a valid basis for downward departure in the absence of any proof of prosecutorial misconduct. **United States v. Yeaman**, 248 F.3d 223, 230 (3rd Cir. 2001). Zollino makes no such claim here. Clearly, disparate sentences can be warranted based upon cooperation provided to law enforcement by a defendant. **See United States v. Meza**, 127 F.3d 545,547 (7th Cir. 1996). The Government asserts that Fahey was granted a downward departure under Section 5K1.1 of the Sentencing Guidelines based upon his substantial assistance. The disparity in sentences was justified.

5. Government Motion to Dismiss Merrill Lynch Garnishment

Pursuant to an application filed by the United States, an Order was issued on August 15, 2003 for a writ of garnishment of any property belonging to Zollino in the possession and control of Merrill Lynch. (Docket no. 166). In its Answer, Merrill Lynch denied that it possessed any such property and requested attorney's fees under Rule 677 of the Texas Rules of Civil Procedure. (Docket no. 170). Based upon that information, the United States filed a motion to dismiss the Merrill Lynch garnishment. (Docket no. 180). The motion should be granted. The request of Merrill Lynch for attorney's fees should, however, be denied. As noted by the government, the Federal Debt Collection Procedures Act–specifically 28

U.S.C. Section 3205 which relates to garnishment–does not authorize an award of attorney's fees to the garnishee. (See docket nos. 177,183).

6. Zollino Motion for Hearing on Post-Judgment Garnishment

In August 2003, the United States applied for writs of garnishment of property within the possession and control of Merrill Lynch, Jefferson State Bank, Broadway National Bank, and Frost National Bank. (Docket nos. 160,163,164,165). The District Court granted the applications. (Docket nos. 166-169). The District Clerk then issued notices of the garnishments to Zollino. The notices advised him of his right to object to the garnishment and request a hearing on his objections in accordance with 28 U.S.C. Section 3205(3)(B) AND (C)(7). Within the prescribed time, Zollino requested a hearing. (Docket no. 178).

In their answers to the garnishments, Merrill Lynch, Broadway National Bank, and Frost National Bank indicated they possess no property of Zollino's and are not indebted to him. Based upon those representations, the government filed motions to dismiss the garnishments, which motions were granted by the District Court as to Broadway National Bank and Frost National Bank. (Docket nos. 177,183). As discussed above, this Court recommends that the garnishment against Merrill Lynch also be dismissed. Jefferson State Bank responded in its answer that it is indebted to Zollino in the amount of $26.74 in the form of a checking account. (Docket no. 174). The government had advised the Court that, in light of the negligible amount, it will also file a motion to dismiss the Jefferson State Bank garnishment. Therefore, Zollino's request for a hearing should be denied.

Recommendation

It is, therefore, the recommendation of the Magistrate Judge that Zollino's Section 2255 motion to vacate sentence and request for a hearing on garnishment be **DENIED**, that the

government's motion to dismiss the garnishment against Merrill Lynch be **GRANTED,** and that Merrill Lynch's request for attorneys' fees be **DENIED**.

Instructions for Service and

Notice of Right to Appeal/Object

The United States District Clerk shall serve a copy of this Memorandum and Recommendation on all parties either by (1) certified mail, return receipt requested, or (2) facsimile if authorization to do so is on file with the Clerk. Pursuant to Title 28 U.S.C. Section 636(b)(1) and Rule 72(b), Fed.R.Civ.P., any party who desires to object to this report must serve and file written objections to the Memorandum and Recommendation within 10 days after being served with a copy unless this time period is modified by the district court. A party filing objections must specifically identify those findings, conclusions, or recommendations to which objections are being made and the basis for such objections; the district court need not cosider frivolous, conclusive or general objections. **Such party shall file the objections with the Clerk of Court and serve the objections on all other parties and the Magistrate Judge.** A party's failure to file written objections to the proposed findings, conclusions, and recommendations contained in this report shall bar the property from a **de novo** determination by the district court. **See Thomas v. Arn**, 474 U.S. 140, 150 (1985). Additionally, any failure to file written objections to the proposed findings, conclusions, and recommendation contained in this Memorandum and Recommendation within 10 days after being served with a copy shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. **Douglass v. United Services Automobile Association**, 79 F.3d 1415, 1428-29(5th Cir. 1996).

SIGNED Thursday, January 22, 2004.

/s/
JOHN W. PRIMOMO
United States Magistrate Judge

UNITED STATES DISTRICT COURT
Western District of Texas
San Antonio Division FILED

UNITED STATES OF AMERICA

v. Case Number SA-01-CR-180(1)-EP
USAO Number 1999R05219

JOSE ZOLLINO
Alias(es): Joey Zollino, Jose Patricio Zollino

Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, JOSE ZOLLINO, was represented by Gerald Goldstein.

On motion of the United States, the Court has dismissed the remaining counts as to this defendant.

The defendant pled guilty to Count(s) One (1) and Twelve (12) of the Superseding Indictment on May 15, 2002. Accordingly, the defendant is adjudged guilty of such Count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number
18 USC §371	Conspiracy to	From on or	One (1)

	Commit Fraud	about June 1993 to on or about June 1999	
18 USC §1956(h)	Conspiracy to Launder Monetary Instruments	From on or about June 1993 to on or about June 1999	Twelve (12)

As pronounced on October 9,2002, the defendant is sentenced as provided in page 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $100.00 on each of count for a total of $200.00. Payment of special assessment shall begin immediately. Said special assessment shall be made to the Clerk, U.S. District Court, 655 East Durango Blvd., San Antonio, Texas 78206.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the Court and United States Attorney of any material change in the defendant's economic circumstances.

Signed this 28th day of October, 2002.

/s/
EDWARD C. PRADO

United States District Judge

Defendant's SSN: 458-67-7893
Defendant's Date of Birth: 03/17/1948
Defendant's address: c/o Central Texas Parole Violator's Facility, 218 South Laredo, San Antonio, TX 78207

Defendant: JOSE ZOLLINO
Case Number: SA-01-CR-180-(1)-EP

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 60 months on Counts One (1) and 144 months on Count Twelve (12) to **run concurrent.**

That the defendant serve this sentence at Federal Prison Camp in Elgin, Florida.

That if eligible, the defendant participate in the 500 - Hour Intensive Drug Abuse Education Program.

That a scheduling conference be held to allow the defendant and his counsel to participate in any classification and

The defendant shall remain in custody pending service of sentence.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: JOSE ZOLLINO
Case Number: SA-01-CR-180-(1)-EP

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall comply with the standard conditions that have been adopted by this Court as set forth on page 4 of this judgment; and shall comply with the following additional conditions:

X The defendant shall pay an fine, special assessment, costs of prosecution or restitution the remains unpaid at the commencement of the term of supervised release on a schedule to be approved by the court.

X The defendant shall notify all employers of his conviction and criminal justice status, and permit the probation officer to verify such notification.

X If the defendant is employed in a position requiring the handling of money or the disbursing of funds, the defendant shall notify the employer of his conviction and permit the probation officer to verify such notification.

X The defendant shall not be employed in a fiduciary position without the prior approval of the probation officer.

X The defendant is prohibited from the employment or participation in any multi-level marketing or investment business.

X The defendant shall be prohibited from incurring any new credit charges or purchasing any credit products, including loans, credit cards, or lines of credit without

prior approval of the probation officer unless the defendant is in compliance with the payment schedule.

X The defendant shall maintain a single checking account in his name only. The defendant shall deposit into this account any income, monetary gains or other pecuniary proceeds and make use of this account for payment of all personal expenses.

X The defendant shall not transfer, sell, give away or otherwise convey any asset over $500 unless approved in advance by the probation officer.

X The defendant shall provide the probation officer access to any requested financial information including personal and business tax returns, bank and investment statements, cancelled checks, telephone bills, Internet service provider agreements and billing records, safe deposit box contents lists and pay stubs or paychecks.

X The defendant shall authorize release to the U.S. Probation officer any and all financial information by execution of a release of financial information form, or by any other appropriate means, as directed by the probation officer.

X The defendant shall provide the Probation Officer each month a list of all foreign and domestic bank and investment accounts, including names of financial institutions and account numbers. In addition, as directed by the probation officer, the defendant shall submit to the probation officer any related account statements.

X The defendant shall surrender his passport to the probation officer and shall not obtain or apply for a passport without the probation officer's approval.

X The defendant shall not open a post office box or private mailbox or receive mail or be a box holder at a

post officer or private mailbox unless the defendant receives prior approval from the probation officer.

X The defendant shall submit to an evaluation for substance abuse or dependency treatment as directed by the probation officer, and if deemed necessary by the probation officer, the defendant shall participate in a program approved by the probation officer for treatment of narcotic addiction or drug or alcohol dependency which may include testing and examination to determine if the defendant has reverted to the use of drugs or alcohol. The defendant may be required to
contribute to the costs of services rendered (copayment) in the amount to be determined by the probation officer, based on the defendant's ability to pay.

X The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment at least two periodic drugs tests thereafter, as directed by the probation officer.

Defendant: JOSE ZOLLINO
Case Number: SA-01-CR-180-(1)-EP

CONDITIONS OF SUPERVISION

Mandatory Conditions:

1) The defendant shall not commit another federal, state or local crime.
2) The defendant shall not illegally possess a controlled substance.
3) If the judgment imposed a fine or restitution obligation, it shall be a condition of supervision that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervision in accordance with any schedule of payments set forth in the Criminal Monetary Penalties sheet of the judgment. In any case, the defendant shall cooperate with the Probation Officer in meeting any financial obligations.
4) In supervised release cases only, the defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.
5) If convicted of a felony, the defendant shall not possess a firearm, destructive device or any other dangerous weapon.
6) For offenses committed on or after September 13,1994, the defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment or placement on probation and at least two periodic drug tests thereafter, as directed by the Probation

Officer.

Standard Conditions:

1) The defendant shall not leave the judicial district without the permission of the Court or Probation Officer.
2) The defendant shall report to the Probation Officer and shall submit to truthful and complete written report within the first five days each month.
3) The defendant shall answer truthfully all inquiries by the Probation Officer and follow the instructions of the Probation Officer.
4) The defendant shall support his or her dependents and meet other family responsibilities.
5) the defendant shall work regularly at a lawful occupation unless excused by the Probation Officer for schooling, training or other acceptable reasons.
6) The defendant shall notify the Probation Officer at least ten days prior to any change in residence or employment.
7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substance, except as prescribed by a physician.
8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the Probation Officer.
10) The defendant shall permit the Probation Officer to visit him or her at any time at home or elsewhere and

shall permit confiscation of any contraband observed in plain view of the Probation Officer.

11) The defendant shall notify the Probation Officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the Court.

13) As directed by the Probation Officer, the defendant shall notify third parties of risks that may be occasioned
by the defendant's criminal record or personal history or characteristics, and shall permit the Probation Officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: JOSE ZOLLINO
Case Number: SA-01-CR-180-(1)-EP

FINE

The fine is waived because of the defendant's inability to pay.

Defendant: JOSE ZOLLINO
Case Number: SA-01-CR-180-(1)-EP

RESTITUTION AND FORFEITURE

RESTITUTION

The defendant shall pay restitution in the amount of $341,787,496.00 to all payee(s). Restitution shall be paid immediately through the Clerk, United States District Court for transfer to payee(s).

Any payment shall be divided proportionately among the payees named.

Name of Payee	Amount of Restitution
IG Services, Ltd. Len B. Blackwell, Trustee c/o Inverworld, Inc. 153 Treeline Park, Suite 301 San Antonio, Texas 78209	$341,787,496.00

The defendant shall pay interest on restitution of more than $2,500.00, unless the restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. §3612(f). All payment options may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

28 U.S.C. §2253

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from–

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).